SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 35

THE UNITED STATES OF AMERICA, PETITIONER

vs.

AETNA CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. A., Second Circuit	1	1
Statement under Rule 13	1	1
Record from U. S. D. C., Eastern District of New York	2	1
Summons	2	1
Complaint	3	2
Notice of motion to dismiss	9	5
Affidavit of Eli Resnikoff	10	6
Affidavit of Edward W. Springsteen, read in opposition to motion	14	8
Opinion of Kennedy, *J*	20	11
Order appealed from	25	14
Notice of appeal	27	15
Stipulation as to record	28	15
Clerk's certificate	29	16
Opinion, Frank, *J*	30	18
Opinion, Hand, *J*. (concurring in part)	35	22
Judgment	36	23
Clerk's certificate	36	23
Order extending time to file petition for writ of certiorari	38	25
Order allowing certiorari	39	27

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In the United States Circuit Court of Appeals for the Second Circuit

AETNA CASUALTY & SURETY COMPANY, PLAINTIFF-APPELLANT

against

UNITED STATES OF AMERICA, POST OFFICE DEPARTMENT, DEFENDANT-APPELLEE

Statement under rule 13

This action was commenced by the service of a summons and complaint on or about the 28th day of May, 1947.

On January 22, 1948, an order was made by Hon. Harold M. Kennedy and entered in the office of the Clerk of the United States District Court for the Eastern District of New York, granting a motion made by the defendant to dismiss the complaint herein. The plaintiff appeals from the order as entered.

The plaintiff is represented by Edward W. Springsteen, as its attorney. The defendant appears by Hon. J. Vincent Keogh, United States attorney for the Eastern District of New York.

There has been no change in parties or attorneys since the commencement of the within action.

2 In the District Court of the United States for the Eastern District of New York, Tort Division

Civil Action File No. 8130

AETNA CASUALTY & SURETY COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, POST OFFICE DEPARTMENT, DEFENDANT

Summons

To the above-named Defendant:

You are hereby summoned and required to serve upon Edward W. Springsteen, plaintiff's attorney, whose address is 111 Fulton Street, New York City, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[seal of court]

PERCY G. B. GILKES,
Clerk of Court.
By JOHN R. SCOTT, Jr.,
Deputy Clerk.

Dated: New York, May 28, 1947.

3 In the United States District Court

[Same title]

Complaint

The plaintiff herein by its attorney, Edward W. Springsteen, complaining of the defendant, alleges, upon information and belief:

FOR A FIRST CAUSE OF ACTION

I. That the plaintiff is and was at all the times hereinafter mentioned, a foreign insurance corporation, organized and existing under and by virtue of the laws of the State of Connecticut, and was duly licensed and authorized to transact the business of Workmen's Compensation Insurance in the State of New York, and maintained an office at 26 Court Street, in the Borough of Brooklyn, County of Kings, State of New York.

II. That the defendant is the Post Office Department of the United States of America, and operated, maintained, used and controlled the premises known as the New York General Post Office at 33rd Street and 8th Avenue, New York City.

III. That in the course of its business as aforesaid, the plaintiff issued a certain Workmen's Compensation Policy numbered 1-C-10052, wherein and whereby the plaintiff insured Federal Reserve Bank of New York against its liability for Workmen's Compensation payable to its employees, pursuant to Chapter 41 of the Laws of the State of New York, now known as the
4 Workmen's Compensation Law and Amendments thereto, for the period from January 1, 1945 to January 1, 1946; that the policy was in full force and effect on February 8, 1945.

IV. That the defendant, in the course of its business, operated, maintained, controlled and used a certain overhead mail sack conveyor at, near or in the vicinity of the loading platform at its General Post Office, 33rd Street and 8th Avenue, in the Borough of Manhattan, City of New York.

V. That on February 8, 1945, at or about 5:40 p. m., Peter Vambell, an employee of the Federal Reserve Bank of New York, while in the course of his employment, was legally and lawfully proceeding on the loading platform of the General Post Office at 33rd Street and 8th Avenue, in the Borough of Manhattan, City of New York, into the building, pushing a hand mail truck containing bags of registered mail belonging to the Federal Reserve Bank of New York and was, of necessity, proceeding beneath a certain conveyor which was attached to a chute upon which there were a number of filled mail sacks, when suddenly and without warning some of the mail sacks fell from the conveyor

due to the careless, negligent and improper manner in which the defendant, its agents, servants or employees loaded, controlled, used and operated the said conveyor, striking the said Peter Vambell, knocking him to the floor and rendering him unconscious.

VI. That the aforesaid mentioned occurrence and the injuries to the said Peter Vambell were occasioned without any negligence or lack of care on his part, but solely by reason of the carelessness and negligence of the defendant, its agents, servants or employees in the manner in which they operated, maintained, controlled and made use of their building, particularly that part known as a conveyor chute, allowing and permitting certain mail sacks or bags to fall therefrom upon the person of the said Peter Vambell.

VII. That solely by reason of the negligence of the defendant as aforesaid and as a result of being struck by said mail bag or bags, Peter Vambell was rendered sick, sore and disabled, sustained a severe shock to his nervous system, and suffered various and divers injuries, external and internal, to his head, brain and nervous structure, and other bodily injuries.

VIII. That some of such injuries so sustained will be permanent and that Peter Vambell has been compelled and, upon information and belief, will be compelled in the future to undergo great pain and suffering, and has been compelled and will be compelled to lose his income and wages in his occupation as guard and registered mail convoy for the Federal Reserve Bank of New York, by reason of all of which he has been damaged in the sum of twenty thousand and 00/100 ($20,000.00) dollars.

IX. That subsequent to the date of the alleged accident and prior to the commencement of this action, a claim for Workmen's Compensation benefits was made by Peter Vambell under the Workmen's Compensation Law of the State of New York, and that he gave his employer, the Federal Reserve Bank of New York, due notice of the claim for compensation, all in accordance with the provisions of the Workmen's Compensation Law of the State of New York.

X. That thereafter and prior to the commencement of this action, there were hearings held in accordance with the provisions of the Workmen's Compensation Law, and Peter Vambell received and accepted from the plaintiff certain sums of money due him, all in accordance with the provisions of the Workmen's Compensation Law of the State of New York, which sums of money were paid by the plaintiff.

XI. That more than one year has elapsed since this accident occurred and that there is no action now pending by the said Peter Vambell against the defendant to recover for the injuries so sustained.

XII. That prior to the commencement of this action, due notice of claim was served upon the office of the Post Office Department in New York County, State of New York, by letter under date of April 26, 1946, due notice of the said receipt was made by the Post Office Department, Office of the Solicitor, Washington, D. C., under date of May 15, 1946, and that subsequent thereto and under date of September 16, 1946, a notice was sent to the General Post Office in the City of New York, 33rd Street, and 8th Avenue, advising the said Post Office Department that the claim of the Aetna Casualty & Surety Company was being withdrawn from consideration and advising that an action would be started pursuant to the Federal Tort Claims Act.

XIII. That thereafter and prior to the commencement of this action, Peter Vambell duly elected to accept compensation under the Workmen's Compensation Law of the State of New York and has accepted the sum which the plaintiff herein has paid, and that by reason thereof an assignment by operation of statute was made to the plaintiff herein pursuant to the Workmen's Compensation Law of the State of New York, and the plaintiff is duly assigned to any right, claim, demand, right or rights of action which
7 exist or may exist for the benefit of the said Peter Vambell against the defendant, arising from the aforesaid occurrence and injuries to the said Peter Vambell.

XIV. That by reason of the aforesaid, the plaintiff has been damaged and is entitled to recover from the defendant herein the sum of twenty thousand & 00/100 ($20,000.00) dollars.

FOR A SECOND CAUSE OF ACTION

XV. The plaintiff repeats and re-alleges as a part of this Cause of Action all the allegations contained in paragraphs numbered "I," "II," "III," "IV," "V," "VI," and "VIII."

XVI. That the plaintiff, in accordance with the policy of Workmen's Compensation Insurance covering the Federal Reserve Bank of New York, paid the sum of three hundred forty-eight and 67/100 ($348.67) dollars for medical treatment necessitated by Peter Vambell's condition for which is employer, the Federal Reserve Bank of New York, was responsible under the Workmen's Compensation Law of the State of New York, thereby becoming subrogated to any right, claim, demand, right or rights of action which exist or may exist for the benefit of the said Peter Vambell and the Federal Reserve Bank of New York, arising from the aforesaid occurrence and the injuries to the said Peter Vambell.

XVII. That by reason of the aforesaid payments, the plaintiff has been damaged and is entitled to recover from the defendant

herein the sum of three hundred forty-eight and 67/100 ($348.67) dollars.

8 Wherefore the plaintiff demands judgment against the defendant for the sum of twenty thousand, three hundred forty-eight and 67/100 ($20,348.67) dollars, together with the costs and disbursements of this action.

EDWARD W. SPRINGSTEEN,
Attorney for Plaintiff,
Office and P. O. Address, 111 Fulton Street,
Borough of Manhattan, City of New York, 7.

Verified on May 27, 1947, by Edward W. Springsteen as Plaintiff's attorney.

9 In the United States District Court

[Same title]

Notice of motion to dismiss

SIRS: Please take notice that the United States of America, defendant herein, will move this Court at a Term for Motions to be held in the courtroom thereof at the Federal Courthouse, 271 Washington Street, Brooklyn, New York, on the 20th day of August 1947, at 10:30 a. m. in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the complaint and the action herein on the ground that the Federal Tort Claims Act does not authorize the maintenance of an action by a subrogee or assignee of a cause of action thereunder, and on the further ground that this action is barred by Sec. 203 of Title 31 United States Code, and that this Court lacks jurisdiction to entertain this action and for such other and further relief as to the Court will seem just and proper.

Dated: Brooklyn, New York, July 24, 1947.

Yours, etc.

J. VINCENT KEOGH,
United States Attorney, Eastern District of New York,
Attorney for Defendant, Office and P. O. Address, 271
Washington Street, Brooklyn, New York.
By ELI RESNIKOFF,
Assistant U. S. Attorney.

10 In the United States District Court

[Same title]

Affidavit of Eli Resnikoff, read in support of motion

Eli Resnikoff, being duly sworn, says:

1. I am an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such, in charge of this action on behalf of the defendant herein, and familiar with the facts and circumstances of the alleged cause of action and with the proceedings heretofore had herein.

2. This affidavit is respectfully submitted in support of the motion by the defendant to dismiss the complaint on the ground that the Federal Tort Claims Act (Public Law No. 601, 79th Cong., 2nd Sess. (August 2, 1946) Chapter 753, Title 4, Section 401–424), under which this action was brought, does not authorize the maintenance of suits upon derivative claims such as the suit by the plaintiff herein who is a subrogee and an assignee of the alleged claim, and on the further ground that the action is prohibited by Section 203 of Title 31 United States Code, so that this court lacks jurisdiction to entertain this action.

3. This action was commenced by the filing of a summons and complaint on May 28, 1947. Service of process was made on the United States Attorney for the Eastern District of New York on May 29, 1947, and upon the Attorney General of the United States, in accordance with the provisions of the Act. The time of the defendant to appear, answer or move herein has not yet expired.

Affidavit of Eli Resnikoff, Read in Support of Motion

11 4. The complaint alleges for a first cause of action that plaintiff is an insurance corporation, organized and existing under the laws of the State of Connecticut, and duly transacting the business of Workmen's Compensation Insurance in the State of New York, that as such it insured the Federal Reserve Bank of New York against its liability for Workmen's Compensation payable to its employees, pursuant to the Workmen's Compensation Law; that on February 8, 1945, one Peter Vambell, an employee of said bank, was injured in the course of his employment while pushing a hand mail truck containing bags of mail belonging to the bank in the vicinity of a loading platform in the General Post Office Building of the defendant at 33rd Street and 8th Avenue, Borough of Manhattan, City of New York, where some mail sacks fell upon him from an overhead conveyor due to the negligence of the defendants, its agents, servants or employees without any negligence on the part of the said Peter Vambell, as a result of which he sustained personal injuries and the loss of income and wages, past and future, to his damage in the sum of $20,000; that he received from the plaintiff certain sums of money due him, in accordance with the provisions of the Workmen's Compensation Law; that more than one year has elapsed since the accident occurred and that no action has been brought by him against the defendant to recover for the injuries

so sustained; that on April 26, 1946, plaintiff served notice claim upon the Post Office Department which was withdrawn on September 16, 1946, by a notice advising the Department that an action would be started pursuant to the Federal Tort Claims Act; that Peter Vambell elected to accept compensation under the Workmen's Compensation Law of the State of New York, and accepted the sum which the plaintiff has paid him, and that by reason thereof an assignment by operation of statute was
12 made to the plaintiff pursuant to said statute and that plaintiff is duly assigned to any right of action which exists for the benefit of said Peter Vambell against the defendant arising from the aforesaid occurrence and injuries to him and that by reason of the aforesaid plaintiff has been damaged and is entitled to recover from the defendant the sum of $20,000.

5. Plaintiff alleges for a second cause of action that it paid the sum of $348.67 for medical treatment of said Peter Vambell's condition, for which the employer aforementioned was responsible under the Workmen's Compensation Law, thereby becoming subrogated to any claim or right of action which may exist for the benefit of said Peter Vambell and his employer arising from the aforesaid occurrence and injuries sustained by him, and that by reason of the said payments plaintiff has been damaged and is entitled to recover from the defendant the said sum of $348,67, making a total of $20,348.67, for which plaintiff demands judgment against the defendant with costs and disbursements.

6. There is no allegation of the amount of the payments made by the plaintiff to Peter Vambell, as alleged in the first cause of action. Ordinarily, in an action under similar circumstances against an individual defendant the plaintiff would, upon obtaining judgment, be obliged to pay to the injured plaintiff the balance of the recovery over and above the amounts paid by it to the injured employee for expenses of medical treatment and other compensation benefits and costs and disbursements of the action, pursuant to the provisions of the Workmen's Compensation Law.

7. Plaintiff in this action similarly seeks to recover the full amount of damages for the personal injuries sustained by
13 Peter Vambell and the amount paid by plaintiff for his medical treatment, and seeks to accomplish this purpose by bringing the action under the provisions of the Federal Tort Claims Act. It is respectfully submitted that the Act does not authorize or contemplate an action of this kind. In all the language used in the Act there is no reference to an assignee or subrogee, and since the purpose of the Act is to grant specific rights to a specific group, it must be strictly interpreted and applied.

8. It is further respectfully submitted that the alleged subrogation and assignment of the claim and cause of action of Peter Vambell is null and void as against the United States of America under the provisions of Section 203 of Title 31 United States Code, since no assignment of the claim was made in accordance with the requirements of said statute.

Wherefore, the court is respectfully requested to dismiss the complaint, with costs to the defendant.

ELI RESNIKOFF.

Sworn to July 24, 1947.

To: Edward W. Springsteen, Esq., Attorney for Plaintiff, 111 Fulton Street, New York 7, New York, Clerk of this Court.

14 In the United States District Court

[Same Title]

Affidavit of Edward W. Springsteen, read in opposition to motion

STATE OF NEW YORK,
County of New York, ss:

Edward W. Springsteen, being duly sworn, deposes and says: That he is the attorney for the plaintiff in this action.

That this affidavit is in answer to a motion made by the United States Attorney for the Eastern District of New York to dismiss the complaint in the action herein on the ground that the Federal Tort Claims Act does not authorize the maintenance of an action by a subrogee or assignee of a cause of action thereunder, and for the further ground that the action is barred by Section 203 of Title 31 of the United States Code, and that this Court lacks jurisdiction to entertain this action, and for such other and further relief as the Court will deem just.

The Federal Tort Claims Act became a law on August 2, 1946 and under Part 3, Section 410, reads as follows:

"(a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on
15 any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for

such damage, loss, injury, or death in accordance with the law of the place where the act or ommission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

"(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: Provided, That the claimant may, upon fifteen days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: Provided further, That
16 as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section."

The plaintiff in this action issued a policy of insurance to the Federal Reserve Bank of New York, 33 Liberty Street, New York City, under which policy it covered the Bank against its liability for workmen's compensation payable to its employees pursuant to the laws of the State of New York. On February 8, 1945, one Peter Vambell, an employee of the Federal Reserve Bank of New York, while in the course of his employment, was injured while in the General Post office at 33rd Street and 8th Avenue, New York City, and the facts of the accident led us to believe that the injuries were sustained due to the negligent maintenance, operation and control of a certain conveyor carrying some mail. As a result of the injuries sustained, Peter Vambell received and accepted certain compensation benefits from the plaintiff in this action as insurer of the Federal Reserve Bank of New York pursuant to certain awards, and as a result of this, the position of the plaintiff in this action is that of an Assignee by operation of law.

All of the rights derived by the plaintiff are contained in paragraph 2, Section 29, of the Workmen's Compensation Law of the State of New York, which reads as follows:

17 "If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefore by subdivision one, such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such fund, person, association, corporation or carrier, as such an assignee, recover, from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents. When the compensation awarded requires periodical payments the number of which cannot be determined at the time of such award, the board shall, when the injury or death was caused by the negligence or wrong of another not in the same employ, estimate the probable total amount thereof upon the basis of the survivorship annuitants table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and such facts as it may deem pertinent, and such estimate shall be deemed the amount of the compensation awarded in such case, for the purpose of computing
18 the amount of such excess recovery, subject to the modification thereof as hereinafter provided."

As can be seen by the above quoted statute, there seems to be no question about the jurisdiction of this Court, and Section 410 states, in part, that it covers "damages to or loss of property or on account of personal injuries or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or ommission occurred;" and hence, as this occurence took place in the State of New York and as the injured person received and accepted workmen's compensation from the plaintiff pursuant to the laws of the State of New York, and for the further fact that by reason of the operation of the New York Statute, the plaintiff became as-

signed to the rights of the claimant and the Court seems to have the necessary jurisdiction.

As to the second point referred to by the United States Attorney, namely, that this action is barred by Section 203 of Title 31 of the United States Code, your deponent would respectfully refer the Court to case of Morgenthau vs. Fidelity & Deposit Co. of Maryland, reported in 95 Federal Reporter, 2nd ed., Page 632, in which the Court held that Section 203 of Title 31 of the United States Code annotated does not apply to assignments by operation of law. The Court, in deciding that case in 1937, referred to the following precedents supporting the conclusion—

"Price vs. Forrest, 173, U. S. 410, 19 S. Ct. 434, 43 L. Ed. 749;

19 "National Bank of Commerce of Seattle vs. Downn, 218 U. S. 345, 31 S. Ct. 89, 54 L. Ed. 1065, 20 Ann. Case 1116;

"Houston vs. Ornes, 252 U. S. 469, 40 S. Ct. 369, 64 L. Ed. 667."

The United States Attorney states that the Act must be strictly interpreted and applied. As a matter of fact, there is nothing in the Act which excludes claims by an Assignee and hence, there is no way by which we could conclude, as he does, that an individual's rights would be wiped out by an assignment, particularly when we were dealing with an assignment by operation of law.

Therefore, your deponent respectfully requests that this motion be denied and that the United States of America, Post Office Department, be directed to answer the complaint in this action.

EDWARD W. SPRINGSTEEN.

Sworn to August 13, 1947.

20 In the United States District Court

AETNA CASUALTY & SURETY COMPANY, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

J. Vincent Keogh, United States Attorney, Attorney for Defendant, Office and P. O. Address, Federal Building, 271 Washington Street, Brooklyn, New York.

Edward W. Springsteen, Attorney for Plaintiff, 111 Fulton Street, New York 7, N. Y.

Opinion of Kennedy, D. J.

KENNEDY, D. J.

The claimant in this action alleges that on February 8, 1945, one Peter Vambell, employed by the Federal Reserve Bank of New York, was injured near the loading platform of the General Post Office Building at 33rd Street and 8th Avenue, Borough of Manhattan, City of New York, as the result of the negligence of

the Post Office employees. It is averred that the plaintiff had, prior to that date, issued a Workmen's Compensation Policy to Vambell's employer and that pursuant to the policy Vambell received and accepted certain sums of money due him, but did not within one year after the accident bring suit against the
21 defendant. It is said that the plaintiff filed its claim with the Post Office Department under date of April 26, 1946, but withdrew it on September 16, 1946. This claim asserted that plaintiff is the subrogee of Vambell (Workmen's Compensation Law of State of New York, Section 29, Paragraph 2).

Plaintiff believes it is entitled to maintain suit against the Government under Section 410 of the Federal Tort Claims Act (28 U. S. C. A., Section 931). Defendant, urging that the Section last mentioned does not permit suit by subrogee, but only by direct claimants, moves to dismiss the complaint. Plaintiff argues that not only under the express language of the Federal Tort Claims Act, but also by analogy with the suits in Admiralty Act (46 U. S. C. A., Section 742), any subrogee is given the benefit of the Government waiver of immunity, equally with a person injured or killed (citing Phoenix Insurance Co. of Hartford vs. United States, and Fidelity & Guaranty Co. vs. United States, and also a very recent case holding squarely that plaintiff's position is correct and that a subrogee may maintain suit under the statute in question, namely, Hill vs. United States.

As I see the problem, there is nothing before me but a question of interpretation of a statute. I am not impressed with the asserted analogy between the Suits in Admiralty Act and the statute upon which complaint at bar is founded, so far as that analogy is said to support the right of subrogee to sue. It can hardly be shown that there is a close analogy between a statute on the one hand like the Federal Tort Claims Act which gives the Court of the United States jurisdiction to render and determine judgment on any claim against United States for money only, accruing on and after January 1, 1945, on account of damages to or
22 loss of property or on account of personal injury or death; and on the other hand a statute which, like the Suits in Admiralty Act, provides for the bringing of a libel in personam against the United States in a case where a proceeding in admiralty could be maintained against private owners. It is true that both statutes to some extent put the Government on the same footing as private persons so far as liability is concerned, the one providing for liability according to the *lex loci delicti*, and the other tacitly providing for liability according to admiralty concept. But it seems to me that the language of the Suits in Admiralty Act is much broader than that found in the Federal Tort Claims Act.

Nor does the Legislative history of the statute under discussion

shed much light on its true meaning, although there are found in that history some passing reference to the question whether Congress intended that subrogees might bring suit.

As I understand Section 410 of the Federal Tort Claims Act, it raises the bar of sovereign immunity only with respect to any claim against the United States on account of damages to or loss of property or on account of personal injury or death under circumstances where the Government would be liable to the claimant for such damage, loss, injury or death all in accordance with the law of the place where the act or omission occurred. Surely this description on its fact does not cover the claim of a subrogee who has under a contract of insurance and in order to earn a premium, made a payment to the injured person.

I agree with a number of things said by Judge Dooley in Hill vs. United States, but not with his conclusion. For example, it is clear to me that the Anti Assignment Act (31 U. S. C. A., 23 Section 203) does not apply to suits under the Federal Tort Claims Act. It is also clearly prescribed that local substitutive law and not Federal Law supplies the rule for decision of cases against the Government under the statute, and the law of Texas, in which form the Hill case was decided, is substantially the same as the law of New York, in that under the statute scheme of Workmen's Compensation the carrier automatically becomes the assignee of the claim of the debtor injured employee upon payment by the carrier, provided that no direct suit is instituted against the tort feasor by the victim of the tort.

However, I cannot be influenced in my interpretation of this Federal Statute by the general rule in force in the State for the determination of liability generally between a subrogee and a tort feasor. What counts is the specific grant by Congress to a specific person of the right to bring a specific form of action against the Government which, were it not for the statute, would be barred, and the specific form of action permitted is by this statute one based mainly on claim on account of damage to or loss of property or on account of personal injury or death, and the specific persons who here benefit by the statute are claimants for such damage, loss, injury, or death. To hold that this covers the case of a subrogee as I view the matter would be to do violence to the language of the statute. It seems to me idle to argue that in general the suit of a subrogee is identical with the underlying tort claim itself.

It is quite true, as Judge Bright says in U. S. Fidelity & Guaranty Co. vs. United States, speaking of a case where suit was brought by an insurance carrier under the Longshoremen's & Harbor Workers' Compensation Act, that "the recovery here sought is the same which the employee himself might seek and

would be within the jurisdiction asserted. That it is
24 brought in the name of someone else, who by Federal Law is given the right to sue, does not and should not change the jurisdiction status." But it is wholly unnecessary here, in view of the specific character of the statute, to go into the question of whether, generally speaking, a subrogee's suit is identical with that of the person in whose rights he claims. The question here, to paraphrase Judge Bright, is whether by this particular Federal Law, the subrogee may sue at all, and under a statute waiving sovereign immunity he certainly cannot unless he brings his suit clearly within the statute described, as here he has not done.

Motion granted—submit order.

HAROLD M. KENNEDY,
United States District Judge.

25 In the United States District Court for the Eastern District of New York

AETNA CASUALTY & SURETY COMPANY, PLAINTIFF

against

UNITED STATES OF AMERICA, POST OFFICE DEPARTMENT, DEFENDANT

Order appealed from

The defendant having moved for an order dismissing the complaint and the action herein on the ground that the Federal Tort Claims Act does not authorize the maintenance of an action by a subrogee or assignee of a clause of action thereunder, and the said motion having duly come on to be heard on the 20th day of August 1947,

Now, on reading and filing the notice of motion dated July 24, 1947, with proof of due service thereof thereto annexed, the affidavit of Eli Resnikoff, Esq., sworn to July 24, 1947, in support thereof, and the opposing affidavit of Edward W. Springsteen, Esq., sworn to August 13, 1947, and upon hearing J. Vincent Keogh, Esq., United States Attorney for the Eastern District of New York, attorney for defendant, by Eli Resnikoff, Esq., of counsel, in support of said motion, and Edward W. Springsteen, Esq., attorney for plaintiff, in opposition thereto, and due deliberation having been had thereon, and the Court's decision in writing having been filed herein.

26 Now, on motion of J. Vincent Keogh, Esq., United States Attorney for the Eastern District of New York, attorney for the plaintiff, it is

Ordered that the motion be and the same hereby is in all respects granted, and it is further

Ordered that the within action be and the same is hereby dismissed with costs.

Dated: Brooklyn, New York, January 22, 1948.

HAROLD M. KENNEDY,
U. S. D. J.

27 In the United States District Court

[Title omitted]

Notice of appeal

Notice is hereby given that the plaintiff above-named hereby appeals to the Circuit Court of Appeals for the Second Judicial Circuit from an Order made by Harold M. Kennedy, United States District Judge, and entered on the 22nd day of January 1948, which dismissed the plaintiff's cause of action with costs on the ground that the Federal Tort Claims Act does not authorize the maintenance of an action by a subrogee or assignee of a cause of action under said Federal Tort Claims Act.

Dated: New York, February 24, 1948.

EDWARD W. SPRINGSTEEN,
Attorney for Appellant,
Office and P. O. Address,
111 Fulton Street, New York 7, N. Y.

28 In the United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true and correct Transcript of Record of the District Court as agreed upon by the parties.

Dated: April 21, 1948.

EDWARD W. SPRINGSTEEN,
Attorney for Plaintiff-Appellant.
J. VINCENT KEOGH,
United States Attorney for the Eastern District of New York, Attorney for Defendant-Appellee.

29 In the United States District Court

[Title omitted]

Clerk's certificate

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Percy G. B. Gilkes, Clerk of the District Court of the United States of America, for the Eastern District of New York, do hereby certify that the foregoing is the transcript record on appeal of the said District Court in the above-entitled matter, as agreed on by the parties, and that the last day to file said record is the 31st day of May 1948.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the City of New York, in the Eastern District of New York, this 21st day of April 1948, in the year of our Lord, one thousand nine hundred and forty-eight, and the Independence of these United States the one hundred and seventy-second.

[SEAL] PERCY G. B. GILKES, *Clerk.*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 25—October Term, 1948

(Argued October 11, 1948 Decided November 4, 1948)

Docket No. 21030

AETNA CASUALITY & SURETY COMPANY, PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, POST OFFCE DEPARTMENT, DEFENDANT-APPELLEE

Before: L. HAND, Chief Judge, CLARK and FRANK, Circuit Judges

Appeal from an order of the United States District Court for the Eastern District of New York. Reversed and Remanded.

EDWARD W. SPRINGSTEEN (William A. Hyman and Harold W. Hayman, of counsel) for plaintiff-appellant.

H. G. MORISON (Paul A. Sweeney and Alvin O. West, of counsel); J. Vincent Keogh (Eli Resnikoff, of counsel) for defendant-appellee.

Opinion of the district court reported in 76 F. Supp. 333.

The complaint alleges that Peter Vambell, an employee of the Federal Reserve Bank of New York, was injured on February 8, 1945, as a result of the negligence of employees of the United States Post Office Department at the General Post Office in Manhattan, New York City. Plaintiff had insured Vambell's employer against its liability for workmen's compensation, and duly paid Vambell's claim under the New York Workmen's Compensation Law. Vambell, the complaint alleges, failed to commence any action against the United States within one year after the accident, and his inaction operated, according to the New York statute, as an assignment to plaintiff of his cause of action against the United States for the injury.[1] The New York law provides that any

[1] The applicable New York statute is §29 of the New York Workmen's Compensation Law, which provides, in part, the following:

"1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee * * * may take * * * compensation and medical benefits and at any time either prior thereto or within six months after the

recovery obtained by plaintiff must first be applied to reimburse plaintiff for the amount paid as compensation, and of the excess, if any, two-thirds is to be paid to Vambell and one-third retained by plaintiff. On motion of the defendant, the United States, the district court dismissed the complaint.

FRANK, Circuit Judge:

We think the dismissal was error. By the Federal Tort Claims Act,[2] a suit may be maintained against the United States "on any claim * * * for money only * * * on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred [and] * * * the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as

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awarding of compensation, * * * pursue his remedy against such other * * * If such injured employee * * * desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation * * * and in any event before the expiration of one year from the date such action accrues. * * *

"2. If such injured employee * * * has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the cause of action against such other * * * to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such * * * person, association, corporation or carrier, as such an assignee, recover from such other * * * a sum in excess of the total amount of compensation awarded to such injured employee * * * and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee * * * two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee. * * *"

[2] 60 Stat. 843, 28 U. S. C. §931 (a), as it read at the time this action was commenced. The new Judicial Code, effective September 1, 1948, makes immaterial amendments in the wording of the statute. 28 U. S. C. §§ 1346(b), 2674.

a private individual under like circumstances * * *" There are certain express exceptions admittedly inapplicable here. The purposes of the Act were two: (1) to end the injustice visited upon persons injured by the torts of employees of the United States, and left without remedy other than an appeal to Congress, and (2) to relieve Congress of the burden of passing upon thousands of private claims presented to it. The latter object was emphasized by the passage of the Tort Claims Act as part of the Legislative Reorganization Act, intended to reform Congressional procedure to allow Congressmen more time for work on national legislation, and by the express provision of that Act forbidding passage of private bills authorizing payment of damages for which suit could be brought under the Tort Claims Act.[3]

The Act contains no mention of claims by subrogees or assignees, but, as Judge Medina has pointed out,[4] Congress had repeatedly acted upon the claims of insurance-company subrogees, and the compelling reasons which led to the enactment of the Tort Claims Act for claims presented by injured individuals apply equally where the claimant is a subrogee or assignee of plaintiff's type.

Were the United States a private person, plainly it would be liable to the plaintiff in the circumstances alleged in the complaint. Defendant's arguments, in effect, rest on the following basis: (1) The United States enjoys immunity from suit without its consent, since it is a successor to the English crown, and therefore to the doctrine that the monarch can do not wrong. (2) This doctrine—long ago severely criticized by Mr. Justice Wilson in *Chisholm* v. *Georgia*, 2 Dall. 419, 453—is so important and stubborn that any consent given by the United States (as a sort of monarch) must be construed in as niggardly fashion as possible.

On this basis—which we regard as untenable in the light of the language and purpose of the statute[5]—defendant urges that the plaintiff, suing in part for reimbursement for compensation paid, failed to bring its claim within the requirement that it be "on account of personal injury"; in other words, since neither the plaintiff nor its property was injured, this could not be a personal injury action.

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[3] Legislative Reorganization Act of 1946, § 131, 60 Stat. 831. The background of the Act has elsewhere been fully discussed. See *The Federal Tort Claims Act*, 56 Yale L.J. (1947) 534; Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 Col. Law Rev. (1947) 722; *Federal Tort Claims Act*, 42 Ill. Law Rev. (1947) 344.

[4] *Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 853.

[5] We consider both, of course; for we do not proceed on the principle that a court is to look at the statute only if its legislative history is ambiguous.

We cannot accept this narrow interpretation of the Act. Plaintiff's claim is founded on, limited by, and substituted for, Vambell's claim for personal injury. In particular, the state statute provides that, upon the failure of the injured employee to bring the action, "*the* cause of action" shall by operation of law be assigned to the insurance "carrier." Although as between Vambell and the plaintiff the final settlement may not be the same as if Vambell had brought the action, so far as the United States is concerned, the cause of action is one.

We reject, as the district court did, the suggestion that the assignment—as the New York statute calls this transfer—is void because not executed in accordance with the Federal Assignment Act.[6] That Act does not apply to involuntary assignments.[7] What is more, the assignment in this case is not voluntary: the claim passed to plaintiff, regardless of Vambell's intent or even of his knowledge that, by delaying, he lost his rights, except to share in any recovery that the insurance company may get, if it chose to sue. Moreover, even if the assignment were otherwise within the Assignment Act, we think the language and purpose of the Tort Claims Act more than sufficient to carve out an implied exception for this type of claim.

A more serious contention raised by the Government is that, if actions by assignees are permitted, the government will lose its privilege of interposing a counterclaim against the employee. Although we do not know whether the government intends to assert a counterclaim in this case,[8] we cannot reserve consideration of this argument until a case arises involving a counterclaim; we think Congress did not intend to make the "involuntary" assignee's right to sue dependent upon the government's assertion or non-assertion of a counterclaim against the employee.

The Act specifically confers jurisdiction on the district courts over any "counterclaim, claim or demand whatever on the part of the United States against any plaintiff commencing an action" under the Act,[9] thus providing for claims against the actual plaintiff; while by ordinary rules of court claims arising out of the same transaction may be offset. It is argued that, if the government wants to assert an unrelated counterclaim against the employee or seek from him more than the amount recoverable by

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[6] R. S. § 3477, 31 U. S. C. § 203.

[7] *Goodman* v. *Niblack*, 102 U. S. 556; *Erwin* v. *United States*, 97 U. S. 392; *Price* v. *Forrest*, 173 U. S. 410.

[8] The case is before us on a motion to dismiss, made before answer and thus before the government indicated whether it would make a counter-claim.

[9] 28 U. S. C. § 1346(c).

the plaintiff, allowing this action might force the Government to bring a separate suit and *pro tanto* its right of counter-claim against the original claimant would be lost;[10] that is to say, to give full effect to this favored situation of the government, we must override as to subrogees and involuntary assignees the direction that we must treat the United States as we would a private individual.[11] We think, however, that the reiterated requirement that we should treat the United States like a private individual is the more fundamental, and the Congress did not intend to limit the jurisdiction of the district courts more than it is limited by the specific exceptions.

The other arguments of the government are less impressive. Assignment of the cause of action may permit venue in a district other than that in which the original claimant could properly have brought the action. If Congress did not intend that result, it has not expressed its intention. The administrative problem of preventing suits by two persons for the same injury is difficult but it does not appear to be insurmountable; and, in the present case, at any rate, there is no chance of two suits, since the plaintiff must prove as part of his cause of action that the employee's action is barred.

Plaintiff is the only real party in interest. The New York statute gives it alone the right to sue, even though it may have to account for part of the recovery to the injured employee. To the extent the plaintiff must turn over its recovery to another, it is a "party authorized by statute" to sue in its own name, expressly designated the "real party in interest" by Rule 17. None of the

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[10] We do not believe that this will in fact be a frequent occurrence; if the government will probably assert a counterclaim for more than the amount recoverable, we suspect that neither the injured person nor the insurer is likely to bring the action. Of course the government may assert a counterclaim arising out of the same transaction to the extent of the plaintiff's recovery. Clark, *Code Pleading* (2d ed. 1947) 679-682.

[11] It is perhaps arguable that, where the Government asserts a counter-claim in excess of the claim against it, the action must be dismissed if the original claimant is more than a necessary, but is an indispensable party under Rule 19 and cannot be joined; or it may be urged that permissive joinder under Rule 20 could be used by the government. We need not here consider those arguments.

cases cited by the Government[12] involved plaintiffs so clearly authorized by statute to bring the action.

Since the Tort Claims Act gives the district court discretion to determine whether attorney's fees should be allowed to plaintiff's counsel,[13] there is no danger of excessive fees being granted plaintiff's attorney. The district court, of course, may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses.

Reversed and Remanded.

L. HAND, Circuit Judge (concurring in part):

I see no necessity for passing upon the question whether this action would lie at all, if the United States suggested that it had a counterclaim against Vambell. In that event it might have to sue twice upon the counterclaim, for nobody supposes that it can do more than use it against the plaintiff at bar as a set-off. Nor can we limit this possibility to cases where the counterclaim exceeds the main claim, for that may be entirely defeated and when it is, no part of the counterclaim will have been paid in the main action. I do not mean to suggest that I have any present opinion as to whether the phrase—"under circumstances where the United States, if a private person, would be liable"—should be held to overbear §1346 (c), relating to counterclaims. I have no such opinion, but in general I believe that courts should decide no more than is necessary to the disposal of the case before them. One never knows how differently upon another presentation the issue may appear; and, though it may be a confession of weakness, I can only say for myself that, after I have found enough on which to rest my decision, I feel a decided slackening of responsibility if I go further.

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[12] *Dayton Veneer & Lumber Mills* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 1 F. R. D. 444; *Lloyd, Moore, Inc.* v. *Schwartz*, 26 F. Supp. 188; *Par-X Uniform Service Corp.* v. *Emigrant Industrial Savings Bank*, 268 App. Div. 699, 53 N. Y. S. (2d) 16.

[13] 28 U. S. C. § 2678.

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of November one thousand nine hundred and forty-eight.

Present: Hon. LEARNED HAND, Chief Judge, Hon. CHARLES E. CLARK, HON. JEROME N. FRANK, Circuit Judges

AETNA CASUALTY & SURETY CO., PLAINTIFF-APPELLANT,

v.

UNITED STATES, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of New York.

This Cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs and cause remanded in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

[Endorsed:] United States Court of Appeals, Second Circuit. 25. Aetna Casualty & Surety Co. v. United States. Judgment. United States Court of Appeals, Second Circuit. Filed Nov. 4, 1948. Alexander M. Bell, Clerk.

United States of America, Southern District of New York

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 39, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Aetna Casualty & Surety Co., plaintiff-appellant, against United States of America, Post Office Department, defendant-appellee, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern

District of New York, in the Second Circuit, this 17th day of December in the year of our Lord one thousand nine hundred and forty-eight, and of the Independence of the said United States the one hundred and seventy-third.

(S.) ALEXANDER M. BELL,
Clerk.

[SEAL]

17 U. S. GOVERNMENT PRINTING OFFICE: 1949 818367

Supreme Court of the United States

No. —, October Term, 1948

THE UNITED STATES OF AMERICA, PETITIONER

vs.

AETNA CASUALTY & SURETY COMPANY

Order extending time to file petition for writ of certiorari

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 4th, 1949.

(Signed) ROBERT H. JACKSON,
Associate Justice of the Supreme Court of the United States.

Dated this 28th day of January 1949.

824810—49

39 Supreme Court of the United States

Order allowing certiorari

Filed April 25, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

845286—49——3

U. S. GOVERNMENT PRINTING OFFICE: 1949

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 36

THE UNITED STATES OF AMERICA, PETITIONER

vs.

WORLD FIRE AND MARINE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. A., Tenth Circuit	"A"	1
Caption [omitted in printing]	"A"	1
Record from U. S. D. C., District of New Mexico	1	1
Complaint	1	1
Amended motion to dismiss	3	2
Response to amended motion to dismiss	4	3
Order denying amended motion to dismiss	5	4
Amended answer	5	4
Defendant's requested findings of fact and conclusions of law	7	6
Plaintiffs' requested findings of fact	8	7
Order adopting plaintiffs' requested findings	10	8
Judgment	11	9
Notice of appeal	12	10
Clerk's docket entry re service of copy of notice of appeal	12	10
Appellant's statement of points	12	10
Plaintiffs' Exhibit 2—Supplemental automobile proof of loss, etc	13	11
Plaintiffs' Exhibit 3—Automobile proof of loss, etc	18	14
Clerk's certificate [omitted in printing]	21	17
Record entry: Cause submitted without oral argument	22	17
Judgment	23	17
Clerk's note re mandate	23	17
Clerk's certificate [omitted in printing]	24	18
Order allowing certiorari	25	18

845282—49——1

"A" [Caption omitted.]

1 In The United States District Court For The District of New Mexico

Pleas and proceedings before The Honorable Colin Neblett, United States District Judge for the District of New Mexico, presiding in the following entitled cause:

DONALD E. HARDING and WORLD FIRE AND MARINE INSURANCE COMPANY, a corporation, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

No. 1208.—Civil

Complaint

Filed April 7, 1947

I

This action arises under Public Law 601, Chapter 753, Title IV, Federal Tort Claims Act.

II

The plaintiff, Donald E. Harding, is a resident of New Mexico, and the plaintiff, The World Fire and Marine Insurance Company is a corporation, incorporated under the laws of the State of Connecticut and is duly authorized to carry on the business of automobile insurance in the State of New Mexico.

III

On th 2nd day of January 1947, at approximately 12:30 P.M., on Highway No. 12 of the State of New Mexico, 1½ miles North of Aragon, New Mexico, the defendant's agent, Ben Kemp, negligently drove a motor vehicle into a motor vehicle to wit: GMC 1½ ton truck owned by the plaintiff, Donald E. Harding, driven by its agent, Glen McCarty.

IV

At the time of the aforementioned negligent act the defendant's agent, the said Ben Kemp, was an employee of the United
2 States Government, Department of Interior, Forest Service and was acting within the scope of his employment while

driving a motor vehicle owned by the United States of America, Forest Service. The defendant, if a private person, would have been liable to the plaintiffs for such damage as hereinafter described.

V

As a result of the aforementioned negligence of the defendant, the plaintiffs herein suffered damages of $1,484.50 in the following particulars:

a. In the amount of $884.50 for repairing and towing the said 1½ ton truck owned by the plaintiff, Donald E. Harding.

b. In the amount of $600.00 for loss of use of said 1½ ton truck owned by the plaintiff, Donald E. Harding.

VI

Under and pursuant to a policy of collision insurance issued to the plaintiff Harding by the plaintiff corporation, the plaintiff corporation has been legally obligated to pay and has paid to the plaintiff Harding, or on his account, the amount of the repairs and towing bill specified above in subparagraph 5-a hereof, less the deductible amount of $100.00 provided by said policy. By reason of such payment and pursuant to said policy, plaintiff corporation has been subrogated to the claim of the plaintiff Harding for the accident and damage above referred to, to the extent of $784.50.

Wherefore, the plaintiffs pray as follows:

1. That the plaintiff, Donald E. Harding, do have and recover from the defendant, The United States of America, Department of Interior, Forest Service, the sum of $700.00.

2. That the plaintiff, The World Fire and Marine Insurance Company, a corporation, do have and recover from the defendant, The United States of America, Department of Interior, Forest Service, the sum of $784.50.

3 3. That the plaintiffs recover all costs herein and such other and further relief as to the Court may seem proper.

RODEY, DICKASON & SLOAN,
By W. A. SLOAN,
Attorneys for the plaintiffs.

In United States District Court

Amended motion to dismiss

Filed Oct. 20, 1947

Comes now the United States of America, defendant herein, by and through Everett M. Grantham, United States Attorney for the District of New Mexico, and respectfully shows to the Court:

I

That under the complaint of the plaintiff, World Fire and Marine Insurance Company, a corporation, it appears from the face of the pleading that the claim of the coplaintiff against the United States of America has been assigned to the World Fire and Marine Insurance Company, a corporation.

II

That under Sec. 203, Title 31, U.S.C.A., such a purported transfer for assignment of the claim of the said Donald E. Harding against the United States of America to the World Fire and Marine Insurance Corporation is null and void and of no effect.

III

That the plaintiff, Donald E. Harding, has no interest in the present suit and is not the real party in interest.

IV

That in this case the real party in interest is the subrogee or assignee, the World Fire and Marine Insurance Company, a corporation, who may not maintain this suit for his own benefit in any form.

Wherefore, the said defendant prays that the Court enter
4 its order mismissing the complaint of the said plaintiff, World Fire and Marine Insurance Company, a corporation.

EVERETT M. GRANTHAM,
United States Attorney.
By ALBERT H. CLANCY,
Assistant U. S. Attorney.

In United States District Court

Response to amended motion to dismiss

Filed Nov. 3, 1947

The plaintiffs, Donald E. Harding and World Fire and Marine Insurance Company, for their response to the defendant's Amended Motion to Dismiss, respectfully show to the Court:

1. That the assignment of the claim of plaintiff, Donald E. Harding, against the defendant to the plaintiff, World Fire and Marine Insurance Company, is not null and void under Title 31 U.S.C.A., Sec. 203, for the reason that said assignment is non-voluntary and arises out of operation of law.

2. That plaintiff, Donald E. Harding, has an interest and claim against the defendant in the present suit in the amount of $700.00 as set forth in the complaint herein.

3. That the plaintiff, World Fire and Marine Insurance Company, is entitled to maintain this suit under Title 28 U.S.C.A., Sec. 931 (Federal Tort Claims Act), for the following reasons:

(a) It has suffered "Damage or loss of property" in the amount of $784.50, paid to plaintiff, Donald E. Harding, as a result of the negligence of an employee of the defendant while acting within the scope of this employment.

(b) The defendant "if a private person would be liable" to the plaintiff, World Fire and Marine Insurance Company, in the amount of $784.50.

(c) That a claim by a subrogee is not listed in Title 28
5 U.S.C.A., Sec. 943, said section containing the list of claims which are excluded under the Federal Tort Claims Act.

Wherefore, the plaintiffs pray that the defendant's Amended Motion to Dismiss be denied.

RODEY, DICKASON & SLOAN,
By PEARCE C. RODEY,
Attorneys for Plaintiffs.

In United States District Court

Order denying amended motion to dismiss

Filed Nov. 5, 1947

And now this cause coming on for hearing upon the defendant's amended motion to dismiss, the plaintiffs appearing by their attorneys, Rodey, Dickason & Sloan, and the defendant appearing by the U. S. Attorney for the District of New Mexico, the Court having heard the arguments of counsel and being fully advised in the premises, finds:

That defendant's Amended Motion to Dismiss should be denied.

Wherefore, it is hereby ordered, adjudged and decreed that the defendant's Amended Motion to Dismiss filed herein be and the same is hereby denied, to which the defendant objects and excepts.

COLIN NEBLETT, *District Judge.*

OK:
EVERETT M. GRANTHAM, *U. S. Attorney.*

In United States District Court

Amended answer

Filed Dec. 5, 1947

Comes the defendant, United States of America, by and through Everett M. Grantham, United States Attorney for the District of

New Mexico, and for its amended answer to the complaint of the plaintiffs herein, alleges:

I

Defendant admits the allegations of Paragraph I of the complaint.

6 II

Defendant admits the allegations of Paragraph II of the complaint.

III

Answering Paragraph III of the complaint, the defendant admits the allegations thereof except the said defendant denies that there was any negligence on the part of the defendant's agent, Ben Kemp.

IV

Answering Paragraph IV of plaintiff's complaint, defendant admits the allegations thereof except the defendant denies that there was any negligent act on the part of defendant's agent, Ben Kemp.

V

Answering Paragraph V of plaintiff's complaint the defendant denies each and every allegation contained therein and denies that plaintiff, Donald E. Harding, suffered any damage by reason of any negligent act of the defendant's agent.

VI

Answering Paragraph VI of the complaint, the defendant does not have sufficient knowledge or information to admit or deny the allegations contained therein. However, the defendant alleges that if the plaintiff corporation has paid to Donald E. Harding any sum of money under a policy of insurance, the said insurance company did not thereupon become subrogated to the claim of the said Donald E. Harding for the reason that the Federal Tort Claims Act does not authorize maintenance of suits by an assignee or subrogee, and that any rights created under the said Federal Tort Claims Act are personal to the said Donald E. Harding; and for the further reason that any purported assignment or subrogation of the claim of the plaintiff Harding against the United States of America is null and void under the provisions of Section 203, Title 31, U. S. Code, Annotated.

EVERETT M. GRANTHAM,
United States Attorney.

7 In United States District Court

Defendant's requested findings of fact and conclusions of law with the Judge's endorsement of refusal

Filed March 16, 1948

Comes the defendant, United States of America, and requests the Court to make the following findings of fact:

1. The accident in question occurred on an unpaved, icy road, approximately 20 feet in width. The drivers of each vehicle involved first saw the other vehicle when the two vehicles were approximately 100 yards apart; each vehicle was then near the center of the road, and each was traveling at the approximate rate of 25 miles per hour.

2. To the right of defendant's vehicle was an embankment; and to the right of plaintiff Harding's vehicle was an irrigation ditch.

3. When the driver of defendant's vehicle observed plaintiff's vehicle, he turned his vehicle to the right from the center of the road. Plaintiff's truck and trailer, which was more than forty feet long and approximately seven and one-half feet wide, also commenced to turn to it's right hand side of the road, and the truck or tractor part of the vehicle went to the outside edge of the highway, but the trailer did not clear the center of the road so that defendant's vehicle would have room to pass.

4. The driver of defendant's vehicle saw that he would not have room to pass between the embankment and the trailer attached to plaintiff's truck and applied his brakes, causing the defendant's vehicle to skid and go out of control.

5. The driver of plaintiff's vehicle did not apply his brakes and did not succeed in getting the trailer which was attached to his vehicle from the center of the road.

6. The driver of defendant's vehicle at all times was exercising due care and caution.

7. The driver of defendant's vehicle was not negligent and the resulting collision was an unavoidable accident.

8 8. Plaintiff Harding was insured by plaintiff World Fire and Marine Insurance Company, a corporation, and the latter plaintiff paid damages to plaintiff Harding's truck, in the amount of $784.50, and said plaintiff Harding was not damaged in that amount, for the reason that said plaintiff insurance company paid for the repairs to said truck.

9. Plaintiff Harding paid rental on a replacement truck, while his truck was being repaired, in the sum of $600.00 and was allowed the sum of $100.00 by the plaintiff insurance company for

transportation of the damaged truck into Albuquerque, New Mexico, from the scene of the collision.

Based upon the foregoing requested findings of fact, defendant requests the adoption of the following conclusions of law:

1. Plaintiffs are not entitled to recover in any amount, because of the lack of negligence on the part of defendant's driver and because the accident was unavoidable.

2. As a matter of law, plaintiff World Fire and Marine Insurance Company, a corporation, is not entitled to be subrogated to the rights of plaintiff Donald E. Harding.

3. Defendant is entitled to judgment in this case.

Respectfully submitted,

EVERETT M. GRANTHAM,
United States Attorney.

Refused.

COLIN NEBLETT, *U. S. District Judge.*

In United States District Court

Plaintiff's requested findings of fact

The plaintiffs respectfully request the Court to make the following findings of fact:

1. This action arises under Public Law 601, Chapter 753, Title 4, Federal Tort Claims Act.

2. The plaintiff Donald E. Harding is a resident of the State of New Mexico, and the plaintiff World Fire and Marine Insurance Company is a corporation incorporated under the laws of the State of Connecticut and is duly authorized to carry on the business of automobile insurance in the State of New Mexico.

3. On the 2nd day of January 1947, at approximately 12:30 P. M. on U. S. Highway No. 12 in the State of New Mexico, one and one-half miles north of Aragon, New Mexico, Benjamin W. Kemp, the duly authorized agent of the United State of America, negligently drove a motor vehicle into a motor vehicle owned by the plaintiff Donald E. Harding.

4. At the time of the afore-mentioned negligent act, Benjamin W. Kemp was an employee of the United States Government, Department of the Interior, Forrest Service, and was acting within the scope of his employment while driving a motor vehicle owned by the United States of America.

5. The defendant United States of America, if a private person, would have been liable to the plaintiffs for such damage as was occasioned by said accident.

6. As a result of the afore-mentioned negligence of the defendant's agent, the plaintiff Donald E. Harding suffered damages of One Thousand Four Hundred Eighty-four Dollars and Fifty Cents ($1,484.50) in the following particulars:

(a) In the amount of Eight Hundred Eighty-four Dollars and Fifty Cents ($884.50) for the necessary repairs and towing of the motor vehicle of the plaintiff Donald E. Harding, resulting from said accident.

(b) In the amount of Six Hundred Dollars ($600.00) for the loss of use by the plaintiff Harding of the vehicle of the plaintiff Harding for a period of thirty days, the reasonable rental value of said vehicle being Twenty Dollars ($20.00) per day.

7. Under and pursuant to a policy of collision insurance issued to the plaintiff Harding by the plaintiff World Fire and Marine Insurance Company, a corporation, said corporation legally obligated to pay and has paid to the plaintiff Harding, or on his account, the amount of repairs and towing bills specified above, less the deductible amount of One Hundred Dollars ($100.00) provided by said policy of collision insurance.

8. By reason of such payment and pursuant to said policy the plaintiff corporation has been subrogated to the claim of the plaintiff Harding for the damages above referred to to the extent of Seven Hundred Eighty-four Dollars and Fifty Cents ($784.50).

9. The plaintiff Donald E. Harding is entitled to a judgment against the defendant in the amount of Seven Hundred Dollars ($700.00).

10. The plaintiff World Fire and Marine Insurance Company is entitled to a judgment against the defendant in the amount of Seven Hundred Eighty-four Dollars and Fifty Cents ($784.50).

11. The plaintiff World Fire and Marine Insurance Company is entitled to a further judgment for its costs herein in the amount to be taxed by the clerk.

RODEY, DICKASON & SLOAN,
By W. A. SLOAN,
Attorneys for Plaintiffs.

In United States District Court

Order adopting plaintiffs' requested findings

Filed April 21, 1948

It appearing to the Court that judgment herein was entered on March 16, 1948, and that through oversight the Plaintiffs' requested findings of fact and conclusions of law were not filed at that time, and that such requested findings and conclusions have now been tendered:

Now, therefore, it is ordered by the Court that such requested findings of fact and conclusions of law be filed by the Clerk of this Court nunc pro tunc, and that the plaintiffs' requested findings of fact be and they are hereby adopted as the findings and conclusions of the Court, as of March 16, 1948.

11 Dated: Santa Fe, New Mexico, this 21st day of April, 1948.

COLIN NEBLETT, *District Judge.*

In United States District Court

Judgment

Filed March 16, 1948

The above entitled cause coming on for trial upon the merits before the Court; the plaintiffs appearing by their attorneys, Rodey, Dickson & Sloan and Jackson G. Akin; the defendant, United States of America, appearing by Everett M. Granthan, Federal District Attorney for the District of New Mexico; and the Court having heard the testimony of witnesses and the arguments of counsel, being fully advised in the premises, having found the issues in favor of the plaintiffs and against the defendant and having ascertained the amount of damages of the plaintiffs to be on behalf of the plaintiff Donald E. Harding the sum of $700.00 and on behalf of the plaintiff World Fire & Marine Insurance Company the sum of $784.50, and it appearing to the Court that judgment should be entered in accordance with the foregoing findings; thereupon, upon consideration thereof

It is ordered, adjudged, and decreed as follows:

1. That the plaintiff Donald E. Harding to have and recover from the defendant, United States of America, the sum of Seven Hundred Dollars ($700.00).

2. That the plaintiff, World Fire and Marine Insurance Company, a corporation, do have and recover from the defendant, United States of America, the sum of Seven Hundred Eighty-four Dollars and Fifty Cents ($784.50).

3. That the plaintiff, World Fire and Marine Insurance Company, a corporation, do have and recover from the defendant, United States of America, the further sum of Forty-three Dollars and Sixty-four Cents ($43.64), the amount of its costs herein as taxed by the Clerk.

4. That out of and as part of the recoveries heretofore allowed to the respective plaintiffs herein, other than the recovery
12 of costs, there is awarded to Rodey, Dickason & Sloan as

attorneys for the plaintiffs and attorney fee equal to twenty per centum of each of said recoveries.

To all of which the defendant by its attorney objects and excepts.

COLIN NEBLETT,
United States District Judge.

In United States District Court

Notice of appeal

Filed May 11, 1948

Appellant: United States of America.

Appellees: Donald E. Harding and World Fire and Marine Insurance Company, a corporation.

Notice is hereby given that United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from the final judgment entered in this action on March 16, 1948.

Dated: May 11th, 1948.

EVERETT M. GRANTHAM,
United States Attorney,
Attorney for Appellant,
P. O. Box 1571,
Santa Fe, New Mexico.

Clerk's docket entry re service of copy of notice of appeal

May 11, 1948. Duplicate notice of appeal mailed to Rodey, Dickason and Sloan, Esquires, First National Bank Building, Albuquerque, N. M.

Excerpt taken from Civil Docket No. 34, page 157.

In United States District Court

Appellant's statement of points

Filed May 11, 1948

The defendant, United States of America, relies on the following points in seeking a reversal of the judgment of this Court in the Tenth Circuit Court of Appeals:

13 1. The purported assignment of the claim of plaintiff, Donald E. Harding against the United States to plaintiff World Fire and Marine Insurance Company, a corporation, is void under Section 203, Title 31, U. S. Code Annotated.

2. Under the Federal Tort Claims Act (28 U.S.C.A. No. 931, et. seq.) plaintiff World Fire and Marine Insurance Company, a corporation, may not maintain this suit against the United States

as the assignee or subrogee of plaintiff Donald E. Harding, the right to sue the United States under said Act being personal to said plaintiff Donald E. Harding.

Dated: Santa Fe, New Mexico, this 11th day of May 1948.

EVERETT M. GRANTHAM,
United States Attorney.

Plaintiffs' Exhibit 2

Supplemental Automobile Proof

Policy No. 3002399

Amount of Policy_____. Date of Expiration_____.

Certificate Agency at Albuquerque, N. M.

Sworn statement in proof of loss to World Fire and Marine Insurance Company.

By your policy of insurance above described, you insured Donald E. Harding, (hereinafter called the insured) according to the terms and conditions contained therein against loss occasioned by collision upon the automobile described in said policy as follows:

Model Year 1940.

Trade Name—GMC Truck - 1½ Ton.

Numbers—Series 14806; Motor G22834032.

A loss caused by collision occurred on the 2nd day of Jan. 1947, about the hour of_____the full particulars of which are as follows:

14 The truck had been driven about 200 miles after the collision on Jan. 2 with the U. S. Government Pickup. Between Magdalena and Albuquerque the rear end of the truck began to cause difficulty. When it finally reached Albuquerque it was discovered that the rear axle was badly bent, evidently caused by the blow the truck was struck by the Government vehicle.

The actual cash value of the property described by aforesaid Policy, the other insurance thereon at the time of said loss, the actual loss and damage sustained, and the amount claimed under this Policy are as follows: $152.35 (Statement attached).

There was no other insurance on said automobile except as follows:

The said Automobile at the time of the loss or damage belonged solely to Donald E. Harding and no other person had any interest therein, by chattel mortgage, sale contract, or otherwise, since purchased except as follows:

The said Automobile at the time the loss or damage occurred was being operated by_____Age_____and was being used for the following purposes:

The said loss or damage did not originate by any act; design or procurement on my/our part nor on the part of anyone having

interest in the property insured, or in the said Policy of insurance; nor in consequence of any fraud or evil practice done or suffered by me/us and that no property saved has in any manner been concealed.

It is expressly understood and agreed that the furnishing of this "Proof of Loss" blank to the Assured, or assistance in making up this statement by an Adjuster or any person otherwise an Agent of the Company is an act of courtesy, and is not a waiver of any rights of said Company.

Upon, in the event, and in further consideration of the payment of the above amount by the World Fire & Marine Insurance Company the undersigned hereby agrees that the said Company shall be vested with all rights and causes of action the said undersigned has against any person, persons or Company whomsoever for damages to the insured property, and the undersigned agrees to execute any documents required by said Company in the prosecution of said rights, and the Company is hereby authorized and empowered to sue, compromise or settle in the undersigned's name or otherwise.

Witness my hand at Albuquerque, N. M. this 18th day of March 1947.

DONALD HARDING, *Insured.*

(Certified Correct.)

PAUL P. RUBINCAM, *Adjuster.*

(Certified Correct.)

10-13-48.

Subscribed and sworn to before me this 19th day of March at Albuquerque. Rita Ann Leahy, Notary Public.

Parts—Service Invoice Invoice No. R2632

Inland Motors, Inc.

Distributors

White Motor Company Products

707 No. Broadway Albuquerque, New Mexico Dial 4431

Date February 19, 1947.

Sold to Anderman & Glasebrook, 209 West Gold Avenue, Albuquerque, New Mexico.

Customer's Order No. ------

Terms: Net, 10th of following month.

For repairs made on GMC Truck, Model AC 302, brought into shop by Don Harding on February 14, 1947.

LABOR

Removed and checked rear end, axle housing, and bent axle shafts; renewed one adjusting nut; disassembled and inspected all parts; reassembled and adjusted all parts; renewed side bearing; renewed all thrust washers; renewed 1 axle shaft; road test.

WHITE PARTS

4	41550	Bolt	@ $ .10	$ .40		
8	85X41	Bolt	.12	.96		
4	90425	Washers	.13	.52	Less 15%	$1.60
1	92164	Cone	7.99	7.99	Less 35%	5.19
1	305280	Felt	.17	.17	Less 15%	.14
		Total White Parts				$6.93

ACCESSORIES

1	1661SW	Nut	@ $1.20	$1.20		
2	16676W	Washers	.25	.50	Less 15%	$1.45
1	49422H	Spacer	.51	.51	Net	.51
2	2166097	Axle	9.07	9.07	Net	9.07
1	2044941	Gear & Pinion	40.47	40.47	Net	40.47
		Total Accessories				$51.50

OIL AND GEASE

14 Lbs. Grease @ .20 $2.80 Net $2.80

SUMMARY

Total Labor	$88.13
Total White Parts	6.93
Total Accessories	51.50
Oil and Grease	2.80
	$149.36
State Tax	2.99
	152.35

Certificate of Satisfaction and Authorization to Pay Other Than Assured

(This may also be used when loss is paid to insured and loss payee by agent)

The loss or damage for which this claim is made has been made good to my/our entire satisfaction and I/we hereby release and discharge the World Fire & Marine from all claims and demands for loss or damage which occurred on or about the 2n y of January, 1947, and authorize

payment to Inland Motors, Inc. whose receipt for same shall be a complete acquittance.

Date 3/18/47.

DONALD HARDING, *Assured.*
ALBUQUERQUE NATIONAL TRUST & SAVINGS BANK, *Mortgagee.*

AILEEN GOFF, *Witness.*

The World Fire and Marine Insurance Company
Hartford, Connecticut

Claim No.------
Claim $--------
Claim $--------
Draft $152.35

Payable through Continental Illinois National Bank and Trust Company, Chicago, Illinois.

Supplemental Draft

DENVER, COLO., *March 25, 1947.*

Upon acceptance pay to the order of Inland Motors, Inc. (Donald E. Harding) One Hundred Fifty-two and 35/100 Dollars in full payment and satisfaction of all claims and demands for loss and damage that occurred on January 2, 1947, under Auto Policy No. 3002399—Anderman & Glasebrook, Albuquerque, N. M. Agency and said Policy is reinstated.

BRAERTON, SIMONTON, BROWN, INC.,
(Signature Illegible) *President.*

To The World Fire and Marine Insurance Company, Western Department, Chicago, Illinois.

(Endorsement of Inland Motors, Inc., and bank stamps appear on reverse side of above draft.)

18 *Plaintiff's Exhibit B*

Automobile Proof

Policy No. 3002399 Amount of Policy $1200

Certificate Agency at Albuquerque, N. M.

Date of Expiration 2/5/47

Sworn statement in proof of loss to World Fire & Marine Insurance Co.

By your policy of insurance above described, you insured Donald E. Harding (hereinafter called the insured) according to the terms

and conditions contains therein against loss occasioned by collision upon the automobile described in said policy as follows:

Model Year—1940.
Trade Name—G. M. C.
Type of Body—1½ Ton Truck.
Numbers—Serial 14806; Motor G22834032.
Purchased by Assured Feb. 1946. Used. Actual Cost, Including Equipment—$1200.00.

A loss caused by collision occurred on the 2nd day of Jan. 1947, about the hour of ------ the full particulars of which are as follows:

While traveling northeast one quarter mile north of Aragon, New Mexico, on the highway between Reserve and Datil, the vehicle insured was struck by a U. S. Government Forest Service Chevrolet Pickup proceeding in the opposite direction. This vehicle skidded and struck left front of insured vehicle.

The actual cash value of the property described by aforesaid Policy, the other insurance thereon at the time of said loss, the actual loss and damage sustained, and the amount claimed under this Policy are as follows:

Whole Loss—$732.15.
Amount Deductible—$100.00.
Amount Claimed Under this Policy—$632.15.

19 The said Automobile at the time of the loss or damage belonged solely to Donald E. Harding and no other person had any interest therein, by chattel mortgage, sale contract, or otherwise, since purchased, except as follows:

There was no other insurance on said Automobile, except as follows:

The said Automobile at the time the loss or damage occurred was being operated by Glen McCarty, Age ------ and was being used for the following purposes: Commercial.

The said loss or damage did not originate by any act, design or procurement on my/our part nor on the part of anyone having interest in the property insured, or in the said Policy of insurance; nor in consequence of any fraud or evil practice done or suffered by me/us and that no property saved has in any manner been concealed.

It is expressly understood and agreed that the furnishing of this "Proof of Loss" blank to the Assured, or assistance in making up this statement by an Adjuster or any person otherwise an Agent of the Company is an act of courtesy, and is not a waiver of any rights of said Company.

Upon, in the event, and in further consideration of the payment of the above amount by the World Fire & Marine Insurance Com-

pany the undersigned hereby agrees that the said Company shall be vested with all rights and causes of action the said undersigned has against any person, persons or Company, whomsoever for damages to the insured property, and the undersigned agrees to execute any documents required by said Company in the prosecution of said rights, and the Company is hereby authorized and empowered to sue, compromise or settle in the undersigned's name or otherwise.

Witness my hand at Albuquerque, N. M. this 29th day of January 1947.

DONALD HARDING, *Insured.*

Certified correct.

PAUL P. RUBINCAM, *Adjuster.*

Subscribed and sworn to before me this 29th day of January, 1947 at Albuquerque, N. Mex.

RITA ANN LEAHY,
Notary Public. 10-13-48.

Certificate of Satisfaction and Authorization to Pay Other Than Assured

(This may also be used when loss is paid to insured and loss payee by agent.)

The loss or damage for which this claim is made has been made good to my/our entire satisfaction and I/we hereby release and discharge the World Fire & Marine Ins. Co. from all claims and demands for loss or damage which occurred on or about the second day of January, 1947, and authorize payment to Gatewood Brothers whose receipt for same shall be a complete acquittance.

Date January 29, 1947.

DONALD E. HARDING, *Assured.*
(Illegible) *Mortgagee.*

AILEEN GOFF, *Witness.*

The World Fire and Marine Insurance Company, Hartford, Connecticut

Claim No.------
Claim $------
$------
Draft $632.15

DENVER, COLORADO, *2-6-47.*

Payable through Continental Illinois National Bank and Trust Company, Chicago, Illinois.

Upon acceptance pay to the order of Gatewood Brothers (Donald E. Harding) Six Hundred Thirty-two and 15/100 Dollars in full payment and satisfaction of all claims and demands for loss

and damage that occurred on January 2, 1947, under Auto
21 Policy No. 3002399—Anderman & Glasebrook Agency, Albuquerque, N. M. and said policy is reinstated.

BRAERTON, SIMONTON, BROWN, INC.
N. SIMONTON, *V. President.*

To The World Fire and Marine Insurance Company, Western Department, Chicago, Illinois.

(Endorsement of Gatewood Brothers and bank stamps appear on reverse side of above draft.)

[Clerk's Certificate to foregoing transcript omitted in printing.]

22 In United States Court of Appeals, Tenth Circuit

Record Entry: Cause Submitted Without Oral Argument

Second Day, November Term, Tuesday, November 30th, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard, no one appearing for either party.

Thereupon this cause was submitted to the court without oral argument.

23 In United States Court of Appeals, Tenth Circuit

Judgment

Fourth Day, November Term, Thursday, December 2nd, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of New Mexico and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed on authority of case No. 3701, United States of America vs. The Chicago, Rock Island and Pacific Railway Company, decided by this court on December 1, 1948.

Note re mandate

On January 8, 1949, the mandate of the United States Court of Appeals, in accordance with the judgment of said court, was issued to the United States District Court.

24 [Clerk's Certificate to foregoing transcript omitted in printing.]

25 Supreme Court of the United States

Order allowing certiorari

Filed April 25, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1949

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. —

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

YORKSHIRE INSURANCE COMPANY

No. —

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

THE HOME INSURANCE COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Proceedings in United States Court of Appeals for the Third Circuit	1	1
Appendix to Appellant's brief	1	1
Docket entries	1	1
Complaint in Yorkshire Insurance Co. Ltd. v. U. S.	2	1
Complaint in Home Insurance Co. v. U. S.	4	2
Notice of motion to dismiss in Yorkshire Insurance Co., Ltd. v. U. S.	6	3
Motion to dismiss	7	4
Notice of motion to dismiss in Home Insurance Co. v. U. S.	9	5
Motion to dismiss	10	5
Order of dismissal	11	6
Opinion, Goodrich, J.	13	7
Judgment in Yorkshire Insurance Co. v. U. S.	19	11
Judgment in Home Insurance Co. v. U. S.	20	12
Petition for rehearing	21	13
Order amending opinion and denying rehearing	25	15
Clerk's certificate (omitted in printing)	26	
Orders allowing certiorari		16

1 In United States Court of Appeals for the Third Circuit

Appendix to Appellant's Brief

Docket Entries

July 14, 1947 Complaint of Yorkshire Insurance Company, Ltd., plaintiff vs. United States of America, defendants. Filed July 11, 1947.

Complaint of The Home Insurance Company, plaintiff, vs. United States of America, defendant. Filed July 11, 1947.

July 14, 1947. Notices of Allocation in both cases filed (Trenton). Notices mailed.

Sept. 15, 1947. Notices of Motions to Dismiss Complaints in both cases filed Sept. 12, 1947.

Oct. 22, 1947. Notices of Motions for leave to file Amended Complaints in both cases filed.

Oct. 27, 1947. Hearing on Motions for leave to file Amended Complaints in both cases before Honorable Phillip Forman, Judge. Motions denied.

Hearing on Motions to dismiss both Complaints. Motions granted. Order to be entered (Forman).

Nov. 17, 1947. Order dismissing Complaints without costs. Filed Nov. 14, 1947 (Forman). Copy mailed to Frankel and Frankel, for plaintiffs.

Feb. 13, 1948. Notice of Appeal filed in both cases. Bond for costs on appeal filed. Copies of Notice of Appeal mailed to Clerk of U. S. C. C. A. and Edgar H. Rossbach for United States of America.

Mar. 24, 1948. Stipulation as to record on Appeal filed March 23, 1948. Transcript of Record on Appeal filed with Clerk of U. S. C. C. A.

2 In the District Court of the United States for the District of New Jersey

Civil Action No. 10417. Complaint

YORKSHIRE INSURANCE COMPANY, LTD.,

vs.

THE UNITED STATES OF AMERICA

Complaint

Filed July 11, 1947

—. This action arises against the United States of America under the Federal Tort Claims Act, August 2, 1946, Public Law 601, 79th

Congress (Second Session), Chapter 753, Section 401, et seq., as hereinafter more fully appears.

2. Plaintiff is a corporation with offices at 90 John Street, New York, N. Y. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

3. On February 18, 1945, John Doe (said name being fictitious and the correct name being unknown to the plaintiff), an employee of the United States of America, acting within the scope of his employment as an enlisted man in the United States Navy,
3 negligently refueled an oil burner with gasoline, causing serious and substantial damage by fire to premises owned by Emma R. Stuart, 202 Seventh Avenue, Asbury Park, New Jersey, and leased to the United States Navy, which premises were insured against loss by fire by the plaintiff herein.

4. As a result of the negligence of the United States of America by its employee, John Doe (said name being fictitious and the correct name being unknown to the plaintiff), the plaintiff was obliged to pay and did pay to the assured, Emma R. Stuart, the sum of Three Thousand Eight Hundred Forty-Two Dollars and Six Cents ($3,842.06).

5. Plaintiff avers that all of its said losses and damages were caused by the negligence and carelessness as aforesaid of John Doe (said name being fictitious and the correct name being unknown to the plaintiff), an employee of the United States of America, acting within the scope of his employment, by negligently and carelessly refueling an oil burner with gasoline.

Wherefore, plaintiff demands judgment against the United States of America in the sum of Five Thousand ($5,000.00) Dollars and costs.

FRANKEL & FRANKEL,
Attorneys for Plaintiff,
Kinmonth Building,
Asbury Park, New Jersey.

4 In the District Court of the United States for the District of New Jersey

Civil Action No. 10418. Complaint

THE HOME INSURANCE COMPANY,

vs.

THE UNITED STATES OF AMERICA

Complaint

Filed July 11, 1947

1. This action arises against the United States of America under the Federal Tort Claims Act, August 2, 1946, Public Law 601, 79th

Congress (Second Session), Chapter 753, Section 401, et seq., as hereinafter more fully appears.

2. Plaintiff is a corporation of the State of New Jersey. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

3. On February 18, 1945, John Doe (said name being fictitious and the correct name being unknown to the plaintiff), an employee of the United States of America, acting within the scope of his employment as an enlisted man in the United States Navy,
5 negligently refueled an oil burner with gasoline, causing serious and substantial damage by fire to premises owned by Emma R. Stuart, 202 Seventh Avenue, Asbury Park, New Jersey, and leased to the United States Navy, which premises were insured against loss by fire by the plaintiff herein.

4. As a result of the negligence of the United States of America by its employee, John Doe (said name being fictitious and the correct name being unknown to the plaintiff), the plaintiff was obliged to pay and did pay to the assured, Emma R. Stuart, the sum of Four Thousand Three Hundred Fifty-Four Dollars and Thirty-Four Cents ($4,354.34).

5. Plaintiff avers that all of its said losses and damages were caused by the negligence and carelessness as aforesaid of John Doe (said name being fictitious and the correct name being unknown to the plaintiff), an employee of the United States of America, acting within the scope of his employment, by negligently and carelessly refueling an oil burner with gasoline.

Wherefore, plaintiff demands judgment against the United States of America in the sum of Five Thousand ($5,000.00) Dollars and costs.

FRANKEL & FRANKEL,
Attorneys for Plaintiff,
Kinmonth Building,
Asbury Park, New Jersey.

6 United States District Court, District of New Jersey

Civil Action No. 10417. Notice

YORKSHIRE INSURANCE COMPANY, LTD., PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Notice of Motion to Dismiss

Filed Sept. 12, 1947

To Frankel & Frankel, Esquires, Kinmonth Building, Asbury Park, New Jersey:

Take notice that on September 22, 1947, the defendant, the United States of America, by its attorney, Edgar H. Rossbach,

United States Attorney for the District of New Jersey, will move before the Honorable Phillip Forman sitting in the District Court of the United States at the Federal Building, Trenton, New Jersey, at 10:00 o'clock in the forenoon, to dismiss the complaint of the plaintiff on the grounds that the Federal Tort Claims Act
7 does not permit suit on derivative claims and further that this suit is in violation of the Anti Assignment Statute, 31 U. S. C. A., Section 203.

EDGAR H. ROSSBACH,
United States Attorney.
By JOHN A. WALDRON,
Assistant United States Attorney.

United States District Court, District of New Jersey

Civil Action No. 10417. Motion

YORKSHIRE INSURANCE COMPANY, LTD., PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Motion to Dismiss

Filed Sept. 12, 1947

To Frankel & Frankel, Esquires, Kinmonth Building, Asbury Park, New Jersey:

The defendant, the United States of America, by its attorney, Edgar H. Rossbach, United States Attorney for the District
8 of New Jersey, moves the Court to dismiss the complaint of the plaintiff, for that:

1. The Federal Tort Claims Act under which the plaintiff brings this action does not permit derivative suits.

2. This cause of action is prohibited by the words of the Anti Assignment Statute, 31 U. S. C. A., Section 203.

EDGAR H. ROSSBACH,
United States Attorney.
By JOHN A. WALDRON,
Assistant United States Attorney.

9 United States District Court, District of New Jersey

Civil Action No. 10418. Notice

THE HOME INSURANCE COMPANY, PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Notice of Motion to Dismiss

Filed Sept. 12, 1947

To Frankel & Frankel, Esquires, Kinmonth Building, Asbury Park, New Jersey:

Take notice that on September 22, 1947, the defendant, the United States of America, by its attorney, Edgar H. Rossbach, United States Attorney for the District of New Jersey, will move before the Honorable Phillip Forman sitting in the District Court of the United States at the Federal Building, Trenton, New Jersey, at 10:00 o'clock in the forenoon, to dismiss the complaint of the plaintiff on the grounds that the Federal Tort Claims Act does not permit suit on derivative claims and further that this suit is in violation of the Anti Assignment Statute, 31 U. S. C. A., Section 203.

EDGAR H. ROSSBACH,
United States Attorney.
By JOHN A. WALDRON,
Assistant United States Attorney.

10 United States District Court, District of New Jersey

Civil Action No. 10418. Motion

THE HOME INSURANCE COMPANY, PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Motion to Dismiss

Filed Sept. 12, 1947

To Frankel & Frankel, Esquires, Kinmonth Building, Asbury Park, New Jersey:

The defendant, the United States of America, by its attorney, Edgar H. Rossbach, United States Attorney for the District of New Jersey, moves the Court to dismiss the complaint of the plaintiff, for that:

1. The Federal Tort Claims Act under which the plaintiff brings this action does not permit derivative suits.

2. This cause of action is prohibited by the words of
11 the Anti Assignment Statute, 31 U. S. C. A., Section 203.

EDGAR H. ROSSBACH,
United States Attorney.
By JOHN A. WALDRON,
Assistant United States Attorney.

United States District Court, District of New Jersey

Civil Action No. 10418. Order

YORKSHIRE INSURANCE COMPANY, PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Civil Action No. 10418. Order

THE HOME INSURANCE COMPANY, PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Order of Dismissal

Nov. 14, 1947

This cause having heretofore come before the Court on motion of the defendant, the United States of America, to dismiss
12 the complaints of the plaintiffs, and on motions of the plaintiffs to amend the complaints, and the motions having been heard on October 27, 1947 and submitted for decision, and it appearing to the Court that the Federal Tort Claims Act does not expressly grant consent to suit by the subrogee of a claimant and that consent of the government to be sued being a relinquishment of sovereign immunity, must be strictly interpreted, and it further appearing that the plaintiff's motions to substitute new party plaintiffs comes out of time,

It is, on this 13 day of November, 1947, therefore, by the Court, Ordered, Adjudged and Decreed that the motions to dismiss above referred to, filed on behalf of the defendant, be and are hereby sustained, and these actions are dismissed and the motions to amend the complaints above referred to, filed on behalf of the plaintiffs, are hereby denied;

To all of which findings, rulings, orders and decrees of the Court plaintiffs excepts, and their exception is allowed.

FORMAN,
United States District Judge.

We hereby consent to the entry of the above order as to form only.

FRANKEL & FRANKEL,
Kinmonth Building,
Asbury Park, New Jersey.

13 United States Court of Appeals for the Third Circuit

No. 9616

YORKSHIRE INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

No. 9617

THE HOME INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

Appeals From the Judgments of the District Court of The United States for the District of New Jersey

Argued October 19, 1948

Before Maris, Goodrich and Kalodner, Circuit Judges

Opinion of the Court

Filed November 5, 1948

By Goodrich, Circuit Judge.

The present appeals raise now and interesting questions under the Federal Tort Claims Act, 28 U. S. C. A. § 931 (a), and Rule 17 of the Federal Rules of Civil Procedure.

The basic facts which present the legal point may be taken to be as follows: A property owner suffers injury to his property by fire through negligence of an employee of the United
14 States acting in the course and scope of his employment. An insurance company pays part of the loss to the property owner under a policy issued by it to him. A second insurance company does the same. Whether the two insurance payments cover the entire loss we do not know and no allegation concerning that fact is found in the complaint of either of the appellants. The two insurance companies bring separate actions against the United States in the District Court for the District of New Jersey claiming to be subrogated to the insured's claim against the United States for the damage done to the property.

In each of the actions the United States moved for dismissal on

two grounds. First it said that the Tort Claims Act was not to be interpreted so as to permit the enforcement of rights claimed through subrogation to the position of the person injured.[1] The second ground of the motion was that the actions were prohibited by the Anti-Assignment Act, 31 U. S. C. A. § 203. The defendant's motion prevailed in each case, the District Court putting the decision upon the ground that the Federal Tort Claims Act "does not expressly grant consent to suit by the subrogee of a claimant and that consent of the government to be sued being a relinquishment of sovereign immunity, must be strictly interpreted * * *".

Each insurance company appealed and the two appeals, each presenting identical points, have been argued together. The government abandons the position that it took in the court below. One claiming as a subrogee may, it concedes, sue under the Tort Claims Act and is not precluded by the anti-assignment statute. Since the words of the Tort Claims Act make the United States liable "if a private person would be liable to the claimant for such damage * * *", the concession seems one required by both the wording and purpose of the statute.

The United States now makes objection, however, upon another ground. The force of its objection as applied to these
15 appeals may be illustrated by the following hypothetical case: Suppose a property owner suffers damage by fire to the extent of $11,000 by the negligence of an employee of the United States. Suppose the property owner is insured by ten insurance companies, each for $1,000 and each pays the insured the full amount of the policy issued by it to him. In enforcing the liability imposed by the statute, is the United States to be subjected to eleven suits in possibly eleven different places? The property owner still has $1,000 coming to him and each of the insurance companies is subrogated to the extent of $1,000 to the insured's claim against the tortfeasor. It certainly would be an incongruous result if one tort producing one injury to one piece of property could thus be made the subject matter of eleven suits with a consequent inconvenience to government officers and expense to the taxpayers. Yet if two companies can bring individual actions as subrogees for what they paid in this particular case, it is difficult to see why eight more, if similarly interested, could not do so.

The procedural problem finds its setting in Rule 17 of the Federal Rules of Civil Procedure, requiring that every action be prosecuted in the name of the real party in interest. In the law relating to assignment we have an analogy for subrogation which is in the nature of an assignment by operation of law, although originally the rules concerning the latter subject were developed and applied by

[1] The phrase was: "The Federal Tort Claims Act under which the plaintiff brings this action does not permit derivative suits."

equity courts. At an early day an assignee of a chose in action was permitted to sue in the assignor's name and later was permitted to sue in his own name under real party in interest statutes. But when there were several partial assignees the rule forbidding splitting causes of action prevented them from suing individually. All could join or be joined in one action as parties plaintiff, or the partial assignee could separately intervene in an action by the assignor.[2]

16 The same development is to be found, not without some variations and dissents, with regard to suits of those claiming rights through subrogation.[3] An insurer who has paid an entire loss suffered by the insured is subrogated to his rights. At law he could sue in the name of the insured, in equity or under a real party in interest statute he can sue in his own name.[4]

The problem then arises as to the procedural position of a partial subrogee (insurer) under the Federal Rules. There can be little doubt that his equitable rights in any recovery made by the subrogor (insured) qualify the subrogee as a real party in interest under Rule 17 (a).[5] Both insured and insurer "own" portions

case 2 (D. Ct. N. D. Ohio, 1941); First Nat. Bank of Bloomingdale v. Manufacturers Trust Co., 5 Pike & Fischer Fed. Rules Serv. 17a.141, case 1 (D. Ct. D. N. J. 1941); McWhirter v. Otis Elevator Co., 40 F. Supp. 1 (D. Ct. W. D. S. C., 1941); 2 Moore, Federal Practice § 17.08, p. 2057 (1938).

of the substantive right against the tortfeasor. The only reason for preventing suit by the partial subrogee alone is, as in the case of the partial assignee, to preclude inconvenience and expense to a defendant who might be required to defend a number of separate suits arising out of a single claim, if the rule were otherwise.[6]

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[2] 2 Williston, Contracts § 443 (Rev. ed. 1936); Restatement, Contracts § 156 (1932).

[3] 2 Moore, Federal Practice § 17.08, p. 2049, n. 9 (1938).

[4] See Note, 96 A. L. R. 865 (1935).

[5] Williams v. Powers, 5 Pike & Fischer Fed. Rules Serv. 17a.141,

[6] This reason appears to underlie the concept that one claim can give rise to but one lawsuit, an idea that has resulted in the denial to the partial subrogee or assignee of the right to sue alone in a number of earlier cases. See, e. g., Southern Bell Tel. & Tel. Co. v. Watts, 66 Fed. 460 (C. C. A. 4, 1895); Aetna Ins. Co. v. Hannibal & St. J. R. Co., 1 Fed. Cas. No. 96 (C. C. E. C. Mo. 1874); Regan v. N. Y. & N. E. R. Co., 60 Conn. 124, 22 Atl. 503 (1891); Shawnee Fire Ins. Co. v. Cosgrove, 85 Kan. 296, 116 Pac. 819 (1911); Powell & Powell v. Wake Water Co., 171 N. C. 290, 88 S. E. 426 (1916); London Assurance Co. v. Sainsbury, 3 Doug. 245 (1783).

It is, therefore, clear that the rule of one claim, one lawsuit, is for the benefit of the defendant, and he is the one who should make a timely claim to join the necessary parties.[7] It is a right which may be waived by a defendant, and it has been so held in federal
17 cases applying state procedural codes under the Conformity Act[8] and by state courts.[9] The result has been approved
488 (1889); Gaugler v. Chicago, M. & P. S. Ry. Co., 197 Fed. 79, 83 (D. Ct. D. Mont. 1912).
by secondary authorities and its application urged under the Federal Rules.[10] We think this view is sound and affords a defendant sufficient protection from the embarrassment of numerous lawsuits.

What the United States has thus presented, then, is not a defense upon the merits of the plaintiffs' claim but a procedural rule established for the convenience of it and other defendants similarly situated. And it claims the protection of that procedural rule for the first time upon these appeals. That fact alone does not necessarily prevent its consideration here.[11] But the defense offered does not call for an affirmance upon a procedural ground of a judgment rendered for a substantive reason now abandoned. The United States should have immunity from a multiplicity of suits upon one obligation; but it should pay that obligation if it is found to exist under the statute. It appears that a motion to add further parties

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[7] It is clear that the property owner and other insurers, if any, are necessary parties, since their presence in the lawsuit is required to do complete justice by adjusting all rights. But they are not indispensable in the sense that a final decree cannot be made without affecting their interests or leaving the controversy in such a condition that its final determination is inconsistent with equity. See 2 Moore, Federal Practice, p. 2144 et seq. (1938).

[8] Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473,

[9] Porter v. Lane Const. Co., 212 App. Div. 528, 209 N. Y. Supp. 54 (1925), aff'd 244 N. Y. 523, 155 N. E. 881 (1927); Firemen's Ins. Co. v. Oregon R. R. Co., 45 Ore. 53, 76 Pac. 1075 (1904); Nat. Union Fire Ins. Co. v. Denver & R. G. R. Co., 44 Utah 26, 137 Pac. 653 (1913). See Note, 96 A. L. R. 879, sec. b (1935).

[10] 2 Moore, Federal Practice § 17.08, p. 2057 (1938); 2 Williston, Contracts § 443 (Rev. ed. 1936). See Restatement, Contracts § 156 (1932).

[11] "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy." Hormel v. Helvering, 312 U. S. 552, 557 (1941).

was made and dismissed by the District Court for coming out of time. If the property owner is barred by lapse of time and there are no other claimants the defendant need not be subjected to a multiplicity of suits. Rule 42 providing for consolidation is very broad; so is Rule 21 for adding or dropping parties. The liberal provision for amendment in Rule 15 makes possible the allegation of existence or non-existence of other possible claimants.

18 The judgments must therefore be reversed and the cases go back for further proceedings in the District Court. If the plaintiffs can so present their case as to give the defendant the procedural protection it is entitled to, they may then have a chance to prove their case on the merits.

The judgments will be reversed and the cases remanded to the District Court for proceedings not inconsistent with this opinion.

19 United States Court of Appeals, Third Circuit

No. 9616

YORKSHIRE INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

On Appeal from the United States District Court for the District of New Jersey

Present: Maris, Goodrich and Kalodner, Circuit Judges

Judgment

Nov. 5, 1948

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed and the case remanded to the District Court for proceedings not inconsistent with the opinion.

By the Court

HERBERT F. GOODRICH,
Circuit Judge.

November 5, 1948

[File endorsement omitted.]

20 United States Court of Appeals, Third Circuit

No. 9617

THE HOME INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

On Appeal from the United States District Court for the District of New Jersey

Present: Maris, Goodrich and Kalodner, Circuit Judges

Judgment

November 5, 1948

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed and the case remanded to the District Court for proceedings not inconsistent with the opinion.

By the Court

HERBERT F. GOODRICH,
Circuit Judge.

November 5, 1948

[File endorsement omitted.]

21 In the United States Court of Appeals for the Third Circuit

Nos. 9616 and 9617

YORKSHIRE INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

THE HOME INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

Appeal from the Judgment of the United States District Court for the District of New Jersey

Petition of the United States for Rehearing

Filed Nov. 9, 1948

Comes now the United States, appellee in the above-entitled causes, and presents this its petition for rehearing, and in support thereof respectfully shows:

On page 2 of the printed opinion it is stated:

> Each insurance company appealed and the two appeals, each presenting identical points, have been argued together. The government abandons the position that it took in the court below. *One claiming as a subrogee may, it concedes, sue under the Tort Claims Act and is not precluded by the anti-*
> 22 *assignment statute.* Since the words of the Tort Claims Act make the United States liable "if a private person would be liable to the claimant for such damage * * *," the concession seems one required by both the wording and purpose of the statute. [Italics supplied.]

This, we submit, is a misapprehension of the Government's position. The Government does not concede that a subrogee may sue under the Federal Tort Claims Act and specifically relies upon the anti-assignment statute, among other grounds, in support of its position. The principal point urged by the Government on this appeal was that any action brought against the United States under the Federal Tort Claims Act must be brought in the name of the person who originally sustained the loss and must include the entire claim. On this point the Government argued that the person originally sustaining the loss is the real party in interest under Rule 17 (a) of the Federal Rules of Civil Procedure, that any action brought must be in his name for the entire loss, and that an insurer claiming as partial subrogee cannot maintain an action in its own name against the tort feasor, but must join as an equitable

plaintiff or use plaintiff if it is to be a party to the record at all. In this way, it was argued, in addition to preventing multiplicity of suits, the Government's right of counterclaim against the original claimant was preserved, as contemplated by 28 U. S. C.
23 1346 (c),[1] and the Government was protected from embroilment in conflicting claims and the danger that its rights might be embarrassed by having to deal with several persons instead of one, contrary to the policy of the anti-assignment statute, R. S. 3477, 31 U. S. C. 203, as amended.

While it is true, as the Court has observed in its opinion and as Government counsel acknowledged on oral argument, that the Government was defending, on a procedural ground, a judgment rendered on a substantive ground, this change in position was not intended as, and, we submit, was not a broad concession that "One claiming as a subrogee may * * * sue under the Tort Claims Act and is not precluded by the anti-assignment statute." Instead, the Government's contention always has been that a subrogee may not maintain an action as legal plaintiff under the Tort Claims Act, although different arguments are now being urged in support of that contention.

A modification of the paragraph from the opinion quoted above would not disturb what we conceive to be the basis for this Court's decision, *viz.*, that the property owner and other insurers are necessary but not indispensable parties, and hence their nonjoinder would not justify a dismissal of the actions. We submit that a modification is necessary to make the opinion reflect more accurately the Government's position, in order to prevent any possible prejudice to the Government either in the further proceedings in these actions or in the defense of similar actions in other courts.

24 For the foregoing reasons, petitioner requests that the paragraph quoted above from page 2 of this Court's printed opinion be reexamined and modified.

Respectfully submitted.

H. G. MORISON,
Assistant Attorney General.
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Newark 1, New Jersey.
PAUL A. SWEENEY,
MASSILLON M. HEUSER,
ALVIN O. WEST,
Attorneys, Department of Justice,
Washington, D. C.

NOVEMBER, 1948.

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[1] See Aetna Casualty & Surety Company v. United States (C. A. 2), No. 25, decided November 4, 1948.

Certificate of Counsel

I, Alvin O. West, counsel for the United States in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay and is believed to be meritorious.

ALVIN O. WEST.

NOVEMBER, 1948.

25 United States Court of Appeals, Third Circuit

No. 9616

YORKSHIRE INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

No. 9617

THE HOME INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

Present: Maris, Goodrich and Kalodner, Circuit Judges

Order Amending Opinion and Denying Rehearing

Dec. 6, 1948

And Now, to-wit, on this 6th day of December, 1948, It Is Ordered: (1) That the second full paragraph on page two of the slip opinion be amended to read as follows:

> "Each insurance company appealed and the two appeals, each presenting identical points, have been argued together. The government does not press the point that it took in the court below."

that the paragraph beginning next to the last line on page 2 become part of the second paragraph and that the first sentence be amended to read:

> "It now makes objection, however, upon another ground."

(2) That the petition for rehearing be and the same is denied.

By the Court,

HERBERT F. GOODRICH,
Circuit Judge.

26 Clerk's Certificate to foregoing transcript omitted in printing.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 822251 994

Supreme Court of the United States.

No. 37—October Term, 1949

Order allowing certiorari

Filed April 25, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 38—October Term, 1949

Order allowing certiorari

Filed April 25, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE: 1949